Supreme Court, U.S.
FILED
AUG 0 4 2003
OFFICE OF THE CLERK

No. 03-32

In The
Supreme Court of the United States

STEPHEN NEAL, et al.,

Petitioners,

v.

THE BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STEVEN J. BORANIAN
Counsel of Record
JAMES C. MARTIN
REED SMITH
CROSBY HEAFEY LLP
Two Embarcadero Center
Suite 2000
San Francisco, CA 94111
(415) 543-8700

CHRISTINE HELWICK
DONALD A. NEWMAN
Office of the General Counsel
THE CALIFORNIA
STATE UNIVERSITY
401 Golden Shore, 4th Flr.
Long Beach, CA 90802
(562) 951-4500

Attorneys for Respondents
The Board of Trustees, et al.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a university engages in gender-based discrimination in violation of Title IX, 20 U.S.C. § 1681(a), when it provides athletic opportunities to men and women in substantial proportion to the student body's overall gender composition.

2. Whether a university denies equal protection under the law, redressable under 42 U.S.C. § 1983, when it provides athletic opportunities to men and women in substantial proportion to the student body's overall gender composition in order to achieve equal opportunity for women.

TABLE OF CONTENTS

	Page
Questions Presented	i
Preliminary Statement	1
Statement Of The Case	2
Reasons Why The Petition Should Be Denied	3
A. Every Circuit To Address The Issues Has Determined That Title IX And The Constitution Allow Universities To Allocate Athletic Opportunities In Substantial Proportion To Men's And Women's Student Enrollments	3
B. The Record Here Does Not Provide A Vehicle To Adjudicate The Administrative Policy That Petitioners Have Asked This Court To Review, Nor Does It Clearly Support A Key Factual Predicate To The Issues Presented	7
Conclusion	9

TABLE OF AUTHORITIES

Page

CASES

Boulahanis v. Board of Regents, 198 F.3d 633 (7th Cir. 1999) 5

Brown Univ. v. Cohen, 520 U.S. 1186 (1997) 4

Chalenor v. University of North Dakota, 291 F.3d 1042 (8th Cir. 2002) 5

Cohen v. Brown University, 991 F.2d 888 (1st Cir. 1993) 3, 4

Cohen v. Brown University, 101 F.3d 155 (1st Cir. 1996) 4

Flast v. Cohen, 392 U.S. 83 (1968) 8

Horner v. Kentucky High School Athletic Association, 43 F.3d 265 (6th Cir. 1994) 4

Kelley v. Board of Trustees, 35 F.3d 265 (7th Cir. 1994) 5

Miami University Wrestling Club v. Miami University, 302 F.3d 608 (6th Cir. 2002) 4

Neal v. Board of Trustees, 198 F.3d 763 (9th Cir 1999) 5, 6

Pederson v. Louisiana State University, 213 F.3d 858 (5th Cir. 2000) 4

Pederson v. Louisiana State University, 912 F. Supp. 892 (M.D. La. 1996) 6

Roberts v. Colorado State Board of Agriculture, 998 F.2d 824 (10th Cir. 1993) 5

TABLE OF AUTHORITIES – Continued

Page

STATUTES & RULES

S. Ct. R. 10 ..... 2, 6

42 U.S.C. § 1983 i

20 U.S.C. § 1681(a) i

PRELIMINARY STATEMENT

College athletes have been litigating Title IX in the federal courts for many years, and rarely have courts met disputed issues with such unanimity. Every Circuit (and there have been many) to consider the gender issues inherent in college athletics has held that allocating men's and women's athletic roster spots in substantial proportion to overall student enrollments is consistent with Title IX and the Constitution. In nearly all of those cases, parties have petitioned this Court for writs of certiorari, and this Court has in every instance declined to step in.

This case is no different from those that came before it. In 1993, Respondent California State University Bakersfield ("CSUB") found itself with a profound imbalance in its athletic program. Thus, over the last ten years, CSUB has carefully increased women's participation in athletics, while simultaneously controlling men's participation. The result is an athletic program that allocates opportunity in an even-handed manner and roughly reflects the gender makeup of the student body as a whole. Overall, the program is larger and more diverse than it has ever been.

Considering the agreement among the courts, the Ninth Circuit's affirmation of CSUB's gender-proportionate program was neither surprising nor noteworthy. The opinion created no disagreement in the law, and instead presented the Ninth Circuit's faithful application of uniformly recognized rules to the ordinary facts of this case. In short, there is no reason, let alone a "compelling reason," for this Court to grant discretionary review. *See*

S. Ct. R. 10. Respondents therefore respectfully request that this Court deny the petition for a writ of certiorari.

STATEMENT OF THE CASE

In 1993, men took 61 percent of CSUB's athletic roster spots and 68 percent of available scholarship money, despite making up only 40 percent of the athletics-eligible student body. Thus, under pressure from women's interests, conference requirements, and a shrinking budget, CSUB implemented a long-term plan to bring its athletic program into a more appropriate balance.

CSUB was reluctant to eliminate any of its existing men's and women's teams, including the wrestling team. It therefore adopted a system of squad size targets that would encourage expansion of the women's teams, while simultaneously controlling the size of the men's teams. Under the squad size program, the university gave each men's team a maximum size, while women's teams received a requested minimum. The plan also called for adding more sports.

Over the next eight years, CSUB more than doubled the projected number of women playing on its athletic teams — an increase from 83 to 177 women, against a net reduction of just 3 male participation opportunities. During that time, CSUB added sports for both men and women, and it has kept every team that it had when it commenced its squad size program. Thus, in the end, CSUB's planning resulted in more students playing a wider range of sports.

Although the wrestling team remained CSUB's largest men's team in any sport, the wrestlers and their supporters filed this lawsuit claiming that they were *legally entitled* to more participants. According to the wrestlers, the *only* lawful manner in which universities can allocate men's and women's roster spots is according to men's and women's relative interests. Several Circuits had rejected that argument because it finds support neither in Title IX nor in the relevant regulations. The Ninth Circuit likewise rejected Petitioners' argument as unfounded and affirmed summary judgment in CSUB's favor. This petition followed.

REASONS WHY THE PETITION SHOULD BE DENIED

A. Every Circuit To Address The Issue Has Determined That Title IX And The Constitution Allow Universities To Allocate Athletic Opportunities In Substantial Proportion To Men's And Women's Student Enrollments

In the last eleven years, seven Circuit Courts of Appeals have addressed issues of gender discrimination in college athletics. These courts have been unanimous in holding that universities retain the discretion under Title IX and the Constitution to allocate their men's and women's athletic roster openings in substantial proportion to their overall student enrollments.

The first appellate case to address the issue was *Cohen v. Brown University*, 991 F.2d 888 (1st Cir. 1993), where the First Circuit held that an athletic program that allocated a disproportionate number of participation opportunities to

men violated Title IX. *Id.* at 905-06. In so holding, the First Circuit applied the Department of Education's administrative guidelines on college athletics – known as the Policy Interpretation – and ruled that allocating men's and women's roster spots in proportion to enrollments was perfectly consistent with Title IX. *Id.* at 897-98. Three years later, when the case returned to the First Circuit following final judgment, the court reaffirmed the substantial proportionality standard and observed that "[r]ather than create a quota or preference, this unavoidably gender-conscious comparison merely provides for the allocation of athletics resources and participation opportunities between the sexes in a non-discriminatory manner." *Cohen v. Brown Univ.*, 101 F.3d 155, 177 (1st Cir. 1996). This Court denied the subsequent petition for a writ of certiorari. *Brown Univ. v. Cohen*, 520 U.S. 1186 (1997).

Since *Cohen*, six other Circuits have considered issues involving alleged gender discrimination in college athletics, including in "reverse discrimination" lawsuits brought by male athletes. In every case, the Circuits have upheld substantial proportionality as a fair and legal standard for allocating athletic opportunities. *See Pederson v. Louisiana State Univ.*, 213 F.3d 858, 878 (5th Cir. 2000) (Department of Education's policy guidelines, including the substantial proportionality standard, provide the "proper analytical framework for assessing a Title IX claim."); *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 615-16 (6th Cir. 2002) (holding that eliminating men's wrestling, tennis, and soccer teams for the purpose of reaching gender proportionality violated neither Title IX nor the Constitution, since the university had merely "equalized the athletic opportunities for men and women."); *Horner v. Kentucky High School Athletic Ass'n*, 43 F.3d 265, 275 (6th

Cir. 1994) ("An institution need not pour ever-increasing sums into its athletic programs in order to bring itself into compliance, but has the option of reducing opportunities for the overrepresented gender while keeping opportunities for the underrepresented gender stable."), *appeal after remand*, 206 F.3d 685 (6th Cir. 2000), *cert. denied*, 531 U.S. 824 (2000); *Boulahanis v. Board of Regents*, 198 F.3d 633 (7th Cir. 1999) (holding that eliminating men's wrestling and swimming teams to achieve gender proportionality violated neither Title IX nor the Constitution, so long as men continued to receive roster spots in substantial proportion to overall male student enrollment), *cert. denied*, 530 U.S. 1284 (2000); *Kelley v. Board of Trustees*, 35 F.3d 265, 270 (7th Cir. 1994) (holding that eliminating men's swimming team did not violate Title IX because men continued to be "more than substantially proportionate to their presence in the University's student body."), *cert. denied*, 513 U.S. 1128 (1995); *Chalenor v. University of North Dakota*, 291 F.3d 1042, 1047 (8th Cir. 2002) (eliminating wrestling team did not violate Title IX because the statute permitted the reduction of men's programs to achieve gender proportionality); this case, *Neal v. Board of Trustees*, 198 F.3d 763, 773 (9th Cir. 1999) (joining its "sister circuits in holding does not bar universities from taking steps to ensure that women are approximately as well represented in sports programs as they are in student bodies."); *Roberts v. Colorado State Bd. of Agriculture*, 998 F.2d 824, 830 (10th Cir. 1993) (universities may "comply with Title IX by cutting athletic programs such that men's and women's athletic participation rates become substantially proportionate to their representation in the undergraduate population"), *cert. denied*, 510 U.S. 1004 (1993).

In the above cases, every time a party petitioned for a writ of certiorari, this Court denied the petition, as it did in *Cohen*.

Petitioners begrudgingly admit that there is no conflict among the Circuits (on page 29 of their 30-page petition), but they give two equally flawed reasons why this Court should grant their Petition anyway. First, Petitioners assert that *all* the Circuits are wrong and that only this Court can stop the runaway train. But as this Court understands better than any other, the federal Courts of Appeals do not follow each other blindly, nor do they hesitate to depart from one another when the law and the record convinces them that they ought to. Indeed, if the Courts of Appeals were the mindless "railway cars" that Petitioners make them out to be, this Court would not have written its rules to make Circuit splits the *first* reason for granting certiorari *See* S. Ct. R. 10(a).

Second, Petitioners point out that two district courts have "rejected proportionality" in college athletics. But Petitioners do not fully acknowledge, as they should have, that both those district courts were reversed. *See Neal v. Board of Trustees*, No. CV-F-97-5009 REC, Order Granting Plaintiffs' Motion for Preliminary Injunction (E.D. Cal. Feb. 22, 1999), *rev'd*, 198 F.3d at 773; *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892 (M.D. La. 1996), *rev'd*, 213 F.3d 858 (5th Cir. 2000).

The reason why the Circuits are unanimous on the issues presented here is that the law is clear and without genuine controversy. Title IX prohibits gender discrimination in educational programs, and giving each gender a share of athletic roster spots roughly equal to its representation in the overall student body is even handed and non-discriminatory. Thus,

court after court has held that the substantial proportionality benchmark is useful and consistent with Title IX, its regulations, and their mandate of equal opportunity.

In sum, the Courts of Appeals for the First, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have faithfully and consistently applied Title IX and the Constitution to college athletics, and they have done so in deference to the Department of Education's own interpretation of Title IX and its regulations. There is no reason, let alone a compelling reason, for this Court to add to this body of law.

B. The Record Here Does Not Provide A Vehicle To Adjudicate The Administrative Policy That Petitioners Have Asked This Court To Review, Nor Does It Clearly Support A Key Factual Predicate To The Issues Presented

Although this case began with the 1994 reduction in the wrestling team's size, CSUB's program in the long run has resulted in no substantial reduction in opportunity for male athletes at CSUB. In 1993, CSUB had 116 men on its athletic teams, compared with 113 in 2001, a difference of just three opportunities. As a result, the factual predicate behind Petitioners' arguments – that CSUB "eliminated" male athletic opportunities to achieve gender proportionality – is not clearly presented on this record.

Moreover, and more importantly, the Petition asks this Court to review a three-part administrative policy – the Department of Education's Policy Interpretation – when two of its parts are irrelevant to this case and were not considered below. The courts below considered *only* whether establishing substantial gender proportionality in

CSUB's athletic program violated Title IX and the Constitution. And they held that CSUB's program passed muster in every way. In so holding, the lower courts relied on *one part* of the Policy Interpretation's three-part guideline on college athletics.

Petitioners nevertheless urge this Court to review the Department's Policy Interpretation in its entirety — *all three parts*, even though the second and third parts are irrelevant to this case and were not applied below. It is a request to review an administrative policy in the abstract, which federal courts do not do. *See Flast v. Cohen*, 392 U.S. 83, 96 (1968) ("[I]t is quite clear that the 'oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.'").

The district court and Ninth Circuit recognized as much and declined similar invitations. The district court did so expressly: "The court does not see the need to determine in this litigation if parts two or three of the [Policy Interpretation] are entitled to substantial deference. . . . Because part one of the Three-Part Test is entitled to substantial deference and that is the part with respect to which CSUB proceeded, *the court [is] being asked to make an advisory opinion about the legality of the other two parts.*" (App. 61 (emphasis added))

The prudential limitations expressed by this Court in *Flast* and by the courts below are particularly apposite to this case. This lawsuit began more than six years ago and has undergone a Rule 12(b) motion, preliminary injunction proceedings, cross-motions for summary judgment, two appeals, and a remand. The record is therefore long and complicated. Yet despite its length and the parties' full opportunity to address issues presented, there was still no

comprehensive application below of the Policy Interpretation to CSUB's athletic program. Plaintiffs tried to fill this gap by submitting hundreds of Department of Education documents showing the application of the Policy Interpretation to *other universities*. But that merely cluttered the record further.

In the end, the prohibition on advisory opinions is particularly applicable where, as here, a petition raises issues that were not presented below, were not fully briefed by both sides, and were not addressed by the lower courts. This Court need not and should not intervene for this independent reason as well.

CONCLUSION

The Courts of Appeals agree that the kind of allocation of athletics resources and roster openings undertaken by Respondents in this case does not violate Title IX or the Constitution. In sum, nothing about this case is noteworthy, nor have Petitioners presented a compelling reason for this Court to exercise its discretionary power of review. Accordingly, the Court should deny Petitioners' petition for a writ of certiorari.

Dated: August 4, 2003.

Respectfully submitted,

STEVEN J. BORANIAN
Counsel of Record
JAMES C. MARTIN
REED SMITH
CROSBY HEAFEY LLP

CHRISTINE HELWICK
DONALD A. NEWMAN
Office of the General Counsel
THE CALIFORNIA
STATE UNIVERSITY

Attorneys for Respondents
The Board of Trustees, et al.